77-330

No.

Supreme Court, U. S.
FILED
AUG 31 1977
MICHAEL RODAK, JR., CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1977

COLUMBIA RESEARCH CORPORATION,
an Illinois corporation, and
RAYMOND ANDERSON,

Petitioners,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF CALIFORNIA FIRST APPELLATE DISTRICT

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TABLE OF CONTENTS

	PAGE
Citations to Opinions Below	1, 2
Jurisdiction	2
Question Presented	2
Constitutional Provisions Involved	3
Statement of the Case	3-8
Reason for Granting the Writ	9-15
The Preliminary Injunction Entered In This Cause Is A Constitutionally Impermissible Restriction Of The Petitioners' Right Of Freedom Of Speech Under The First And Fourteenth Amendments, And The Decision Of The Court Of Appeals In Upholding Its Validity Is Not In Accord With Applicable Decisions Of This Court	9
Conclusion	16
Appendix A—Preliminary Injunction entered on December 8, 1975	1a-3a
Appendix B—Opinion of the Court of Appeals of the State of California filed April 7, 1977	4a-10a
Appendix C—Sales letter of Columbia Research Corporation	11a-16a

Table Of Authorities

Anderson, Clayton & Co. v. *Washington State Dept. of Ag.*, 402 F.Supp. 1253 (W.D. Wash. 1975)	11
Baggett v. *Bullitt*, 377 U.S. 360 (1964)	9
Beneficial Corp. v. *FTC*, 542 F.2d 611 (3d Cir. 1976) cert den. 52 L ed 2d 377 (April 25, 1977)	10-11

PAGE

Bigelow v. *Virginia*, 421 U.S. 809 (1975) 10

Dombrowski v. *Pfister*, 380 U.S. 479 (1965) 9

Freedman v. *Maryland*, 380 U.S. 51 (1965) 9

Near v. *Minnesota*, 283 U.S. 697 (1931) 9, 15

New York Times Co. v. *Sullivan*, 376 U.S. 254 (1964) .. 9

Organization for a Better Austin v. *Keefe*, 402 U.S. 415 (1971) 15

Pittsburgh Press Co. v. *Pittsburgh Comm'n on Human Relations*, 413 U.S. at 385 (1973) 15

Smith v. *California*, 361 U.S. 147 (1969) 9

Virginia State Board of Pharmacy v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) 10

CONSTITUTIONAL PROVISIONS

First Amendment, United States Constitution 3

Fourteenth Amendment, United States Constitution .. 3

OTHER AUTHORITIES

Note, *The Chilling Effect in Constitutional Law*, 69 Colum. L. Rev. 808 (1969) 9

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF CALIFORNIA FIRST APPELLATE DISTRICT

Petitioners pray that a writ of certiorari issue to review the judgment of The Court of Appeals of the State of California entered in the above entitled cause on April 7, 1977, which became final on June 2, 1977 when the Supreme Court of The State of California denied a petition for hearing to that court.

CITATIONS TO OPINIONS PREVIOUSLY REPORTED IN THIS CAUSE.

No opinion was rendered by the trial judge. The preliminary injunction entered on December 8, 1975 by the

trial judge is set out below in Appendix A. The injunction was appealed to the Court of Appeals of the State of California, First Appellate District, and the opinion of that court is reported at 71, Cal. App. 3d 607, ... P 2d ..... (1977). It is reprinted as Appendix B to this petition. The decision of the Appellate Court was appealed to the Supreme Court of California by the filing of a petition for hearing. The petition for hearing was denied by the Supreme Court of California n a *per curiam* order without opinion. That order is not reported.

JURISDICTION

The judgment of the Court of Appeals of the State of California, First Judicial District was entered on April 7, 1977. Petitioners filed a timely petition for hearing with the Supreme Court of California which was denied on June 2, 1977. No further appeal procedure is provided under California law and the judgment of the Court of Appeals became the final judgment of the highest court of the State of California in which a decision could be had. The jurisdiction of this court is invoked under 28 U.S.C. §1257(3).

QUESTION PRESENTED

Whether the preliminary injunction entered by the trial court is so vague and overbroad that it constitutes an impermissible restriction upon the petitioners' right of freedom of speech under the First and Fourteenth Amendments of the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the First Amendment and Section 1 of the Fourteenth Amendment to the United States Constitution. The First Amendment provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and petition the Government for a redress of grievances."

Section 1 of the Fourteenth Amendment provides:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

The essential issue presented in this action is directly related to, and a logical extension of recent decisions by this court defining the method and scope by which a state may regulate commercial speech and alleged deceptive advertising. *See Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *Bigelow* v. *Virginia*, 421 U.S. 809 (1975).

The State of California filed this action against the defendants and prayed for the entry of an injunction, civil penalties and other equitable relief. In its complaint, the State alleged that Columbia Research Corporation and Raymond Anderson, its alleged chief executive officer (who will be referred to jointly with Columbia as "Columbia"), had made certain representations in its sales letter which were deceptive and misleading in violation of the

California Business and Professions Code, Section 17500 *et seq,* and which were unfair business practices in violation of the California Civil Code, Section 3369. (A copy of a sales letter of Columbia is attached as Appendix C to this petition and can be found at C.T. 162-165) The State asserted that statements in Columbia's sales letter relative to, the nature of Columbia's offer, the value of its vacation certificate, and the accommodations offered might tend to mislead consumers. (C.T. 1-10)*

Columbia is an Illinois corporation located in Chicago, and is engaged in various aspects of consumer and market research, as well as the sale of vacation certificates by mail. The vacation certificates sold by Columbia entitle the purchaser to vacation packages in various resort areas, both in and outside of the United States. These resort areas include Orlando, Florida, St. Petersburg, Florida, Miami, Florida, Puerto Rico and Las Vegas, Nevada.

Columbia offered purchasers of the certificate which was the subject matter of the instant litigation, accommodations for three days and two nights in Las Vegas, Nevada, as well as meal and beverage discounts, discounts on rental cars, cash nickels, gaming script, free slot play, and other items for the price of approximately $15.00. Transportation was not included. The sponsors of the promotion, which include the motels and casinos in Las Vegas, allocate a certain number of certificates which Columbia is the able to sell by direct mail. These certificates are offered by the casinos and motels to increase

* C.T. will be used as an abbreviation for the "Clerk's Transcript on Appeal" which includes all of pleadings and other affidavits filed in the trial court, and which is being transmitted to this court along with Exhibits A-M, in opposition to the motion for preliminary injunction referred to at page 5 below.

patronage in their operations and to bring additional visitors to Las Vegas.

Columbia does not make the certificates available to the general public. It offers them by direct mail to persons who fall within certain criteria. Individuals who are selected to receive the offer are chosen on the basis of specific criteria which include age, geographic area, income, purchasing habits, marital status and traveling habits. Columbia uses these criteria in order to solicit persons desired by the organizations sponsoring the vacation certificates.

The above criteria are programmed into a computer which then selects the names of individuals from other lists. Columbia then offers the certificate by direct mail to those persons selected by the computer. (C.T. 198-250)

After filing this action the State of California moved for the entry of a preliminary injunction. In support of its motion, the State submitted a memorandum of points and authorities to which is attached certain affidavits, exhibits and answers to interrogatories. The State did not offer a single declaration of a California consumer who took advantage of the Las Vegas vacation certificate and expressed dissatisfaction with the actual vacation. (C.T. 51-153)

In opposition to the motion, Columbia filed declarations and affidavits of over three hundred consumers who had actually taken advantage of its Las Vegas vacation certificate. The affidavits and declarations were arranged in alphabetic order by state, and were bound as Exhibits A-M, in opposition to the motion for preliminary injunction. Exhibit A consisted of declarations of residents from the State of California, Exhibit B—Arizona, Exhibit C—Colorado, Exhibit D—Idaho, Exhibit E—Montana, Ex-

hibit F—New Mexico, Exhibit G—North Dakota, Exhibit H—Oregon, Exhibit I—South Dakota, Exhibit J—Texas, Exhibit K—Utah, Exhibit L—Washington, Exhibit M—Wyoming. In addition, Columbia filed the affidavits of Raymond Anderson, Wavo Blako, the supervisor of customer correspondence, Marshall Sutton, a consultant to Columbia, and Linda Claire, the officer manager of Columbia. (C.T. 198-250)

In each of the three hundred affidavits offered by Columbia, its customers stated under oath, that they received everything which was promised in Columbia's sales solicitation letter, and that it was provided within the time period authorized by California law.

At the time of the hearing on the preliminary injunction Columbia had filled in excess of twenty thousand orders from California residents. Furthermore, twelve thousand persons had taken advantage of the Las Vegas certificates sold by Columbia. Thousands of other purchasers of Columbia's certificate had gone to resort areas in Florida and Puerto Rico. In a survey of the persons who took advantage of the certificates, approximately 97.5% of the people were satisfied with Columbia's vacation offer.

The Court declined to conduct an evidentiary hearing, heard the arguments of counsel, considered the affidavits filed by both sides, and took the case under submission. An order was entered on December 8, 1975 granting the motion for preliminary injunction. A copy of the order is attached as Appendix A to this petition.

In the injunction Columbia was enjoined from making certain representations as to the nature of its offer (paragraph a), the method by which consumers were to be

selected (paragraphs b, c), the value of its offer (paragraph d), and the quality of the goods or services which it offered (paragraphs (e) (f)). Columbia was also enjoined from:

> "(g) failing to disclose any additional charges, restrictions or limitations upon the use or obtaining of any goods or services which are offered by defendants, such disclosures to be made within any promotional materials in immediate proximity to the description of the benefits to which any such limitations, restrictions or additional charges are applicable."

The injunction did not specify what portions of the sales letter caused it to be misleading. No indication of the alleged offending language was indicated anywhere in the trial court's order. The trial court did not indicate what degree of disclosure Columbia was required to make with regards to describing the nature of its offer, or the method by which consumers were to be selected to receive it. Nor was there any statement as to the value which Columbia's vacation certificate actually represented. The order did not explain what representation Columbia could or could not make as to the quality of its services. Furthermore, the court failed to specify what charges, restrictions, or limitations were required to be disclosed, or which were even material.

Accordingly, Columbia appealed the entry of the injunction to the Court of Appeals. Columbia argued that the entry of the injunction was erroneous as a matter of law in that its sales letter was not misleading, and theer was no evidentiary support for its entry. Columbia further argued that the injunction was vague and overbroad and in violation of its right of freedom of speech under the First and Fourteenth Amendments of

the Constitution. Columbia asserted that if it desired to continue to offer its vacation certificate to California consumers, it would be required to guess as to what language in its solicitation was impermissible. Columbia argued that it might even be subject to contempt if its interpretation was incorrect which constituted an unreasonable chilling effect on its ability to do business in the State of California.*

On appeal, the Appellate Court held that the trial court did not abuse its discretion in entering the injunction. The court held that the injunction was neither vague or ambiguous, although it acknowledged that the injunction was broader than necessary to restrain the alleged deceptive advertisements. The Court held that the injunction did not violate the petitioners' rights of freedom of speech under the First and Fourteenth Amendments.

A petition for hearing was filed with the Supreme Court of California asserting the same arguments as outlined above. Columbia asserted before the Supreme Court that the injunction was so broad that it constituted an impermissible burden on its First Amendment rights. (Petition for Hearing p. 36-39) The Supreme Court declined to consider the appeal and entered an order without opinion denying the petition on June 2, 1977.

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* On March 23, 1977, a criminal complaint containing approximately 230 counts of criminal contempt of the injunction was filed against Columbia Research Corporation and Raymond Anderson in San Francisco, California. The State of California has commenced extradition proceedings against Anderson in Illinois based on the criminal complaint. The Govenor of the State of Illinois has not yet determined whether to sign the warrant authorizing extradition. The Govenor has been advised that this petition was being filed to contest the propriety of the injunction upon which the criminal charges are predicated.

REASON FOR GRANTING THE WRIT

THE PRELIMINARY INJUNCTION ENTERED IN THIS CAUSE IS A CONSTITUTIONALLY IMPERMISSIBLE RESTRICTION OF THE PETTTIONERS' RIGHT OF FREEDOM OF SPEECH UNDER THE FIRST AND FOURTEENTH AMENDMENTS, AND THE DECISION OF THE COURT OF APPEALS IN UPHOLDING ITS VALIDITY IS NOT IN ACCORD WITH APPLICABLE DECISIONS OF THIS COURT.

This case presents a classic situation in which the State of California has virtually disregarded the protection which has been given commercial speech in attempting to regulate alleged deceptive advertising. Because the preliminary injunction entered in this cause is so vague and overbroad, and so thoroughly "chills" Columbia's ability to advertise its products it cannot be sustained.

It is axiomatic that under the First Amendment and Fourteenth Amendments of the Constitution, that Congress and the States are precluded from taking any action which infringes upon protected speech. This includes statutes, regulations, or judicial decrees which may have a "chilling" effect on First Amendment freedoms. *Dombrowski* v. *Pfister,* 380 U.S. 479 (1965); *Baggett* v. *Bullitt,* 377 U.S. 360 (1964); *Near* v. *Minnesota,* 283 U.S. 697 (1931); *Smith* v. *California,* 361 U.S. 147 (1969); *Freedman* v. *Maryland,* 380 U.S. 51 (1965); *New York Times* v. *Sullivan,* 376 U.S. 254 (1964); *See Generally,* Note, *The Chilling Effect in Constitutional Law,* 69 Colum. L. Rev. 808 (1969).

Recent decisions of this court have established beyond dispute that commercial speech is protected by the First Amendment. *Virginia State Board of Pharmacy* v. *Vir-*

ginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976), *Bigelow* v. *Virginia,* 421 U.S. 809 (1975). The question which has been left open by this court is the degree of protection given commercial speech, and the extent of permissible state regulation. This case permits an excellent opportunity to answer those questions, and to rectify an erroneous decision which should not be allowed to stand.

Several lower courts have considered these questions in light of the decisions in *Bigelow, supra,* and *Virginia Board of Pharmacy, supra.* In each of the decision, lower courts have refused to sustain the type of regulation which the State of California has sought to utilize in this case. In *Beneficial Corporation* v. *FTC,* 542 F. 2d 611 (3d Cir. 1976), *cert. den.* 52 L. ed. 2d 377 (April 25, 1977), the court was presented with the question of the remedy which may be invoked where there has been a finding of deceptive advertising. In *Beneficial,* the Federal Trade Commission sought the use of a broad order precluding the use of the term instant tax refund or any other word, or words of similar import or meaning. The Third Circuit Court of Appeals refused to enforce this provision of the Federal Trade Commission's order.

While holding that the First Amendment does not mean that an advertiser may engage in speech that is an essential part of a scheme to violate an otherwise valid law, the court went on to state:

> "The Commission (FTC) like any other governmental agency must start from the premise that any prior restraint is suspect, and that a remedy, even for deceptive advertising can go no further than is necessary for the elimination of the deception." 542 F. 2d at 620.

The court found that because the order was broader than necessary to restrain the alleged deceptive language it could not be sustained. It stated:

> "The Commission's order proscribing use of the term instant tax refund or any other word or words of similar import or meaning, without consideration of the context in which the words appear, went further than was permitted for that purpose and was an abuse of the Commission's remedial discretion. It cannot in that form and without such consideration be affirmed or enforced."

Similarly, in *Anderson Clayton & Co.* v. *Washington St. Dept of Ag.,* 402 F. Sppp. 1253 (W.D. Wash. 1975), the court declared unconstitutional a statute regulating commercial speech which was broader than necessary to meet the legitimate interests of the state. The contested statute in *Anderson Clayton* regulated the method by which margarine could be advertised in connection with dairy products.

The court determined that the restriction on the rights of manufacturers of margarine in advertising their products was far greater than legitimately needed to protect citizens of the State of Washington. Consequently, the court held, at page 1257:

> "Assuming, *arguendo,* that Plaintiffs' advertisements do carry confusing and deceptive comparative references to the dairy product butter and their margarine products, as the Defendants would have us believe, and the express purpose and force of RCW 15.40.030 is in the pursuit of a legitimate state interest of the state," nevertheless substantial state law restrictions upon the free exercise of per se or fundamental constitutional rights, such as First Amendment immunities and privileges, are unconstitutional unless the State can demonstrate that such laws are necessary to promote a compelling govern-

mental interest. *Dunn* v. *Blumstein,* 405 U.S. 330, 342, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972); *Kramer* v. *Union Free School District,* 395 U.S. 621, 627, 89 S.Ct. 1886, 23 L.Ed.2d 583 (1969), and *Shapiro* v. *Thompson,* 394 U.S. 618, 634, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969).

Furthermore:

> "[E]ven when pursuing a legitimate interest, a State may not choose means that unnecessarily restrict constitutionally protected liberty. *Dunn* . . . [405 U.S.] at [342,] 343 [92 S.Ct. 995, at 1003, 31 L.Ed.2d 274]. ["Statutes affecting constitutional rights must be drawn with 'precision'. *NAACP* v. *Button,* 371 U.S. 415, 438[83 S.Ct. 328, 9 L.Ed.2d 405] (1963); *United States* v. *Robel,* 389 U.S. 258, 265 [88 S.Ct. 419, 19 L.Ed.2d 508] (1967), and must be 'tailored' to serve their legitimate objectives. *Shapiro* v. *Thompson, supra,* [394 U.S.] at 631 [89 S.Ct. 132]"] . . . If the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties. *Shelton* v. *Tucker,* 364 U.S. 479, 488 [81 S. Ct. 247, 252, 5 L.Ed.2d 231]." *Kusper* v. *Pontikes,* 414 U.S. 51, 58-59, 94 S. Ct. 303, 308, 38 L.Ed.2d 260 (1973).

The court correctly noted that it was possible for a true statement to be violative of the statute as is the situation presented in this case as to the injunction.

The reasons why the restraints contained in the injunction in this cause should be declared impermissible are virtually identical to the reasons why the Third Circuit struck down language of the FTC order in *Beneficial,* and why the State of Washington statute was declared unconstitutional in *Anderson Clayton.* The injunction is simply broader than is necessary to restrain the alleged misleading aspects of Columbia's advertisements. This was specifically acknowledged by the Appellate Court in its opinion. (See Appendix p. 9a).

Instead of directing itself to Columbia's sales letter, the injunction speaks in general language which is not related to any particular aspect of Columbia's advertisement. Rather than correcting the language which the State contended was misleading, the injunction directs itself to a general prohibition unrelated to the sales letter itself. The injunction is so broad that it is impossible to connect it to the alleged offending language.

Although there are numerous examples indicating the vagueness of the injunction, there are two which are readily apparent. Paragraph (g) of the injunction provides that Columbia is enjoined from:

> "failing to disclose any additional charges, restrictions or limitations upon the use or obtaining of any goods or services which are offered by defendants, such disclosures to be made within any promotional materials in immediate proximity to the description of the benefits to which any such limitations, restrictions or additional charges are applicable."

The injunction fails to advise Columbia what restrictions charges or limitations should be disclosed, or even what restrictions charges or limitations are material. The opinion of the Appellate Court fails to assist Columbia in attempting to remedy the defect in its advertisement. In its opinion, the court merely concludes that there were several restrictions and limitations which were not disclosed. However, the court fails to even indicate what they are, or where they should be disclosed. It is impossible for Columbia to ascertain what language should be inserted into its solicitation to comply with the injunction.

Another example is presented by paragraph (d) of the injunction which enjoins Columbia from:

> "making any representation concerning the value of any goods or services which are offered to be sold or otherwise distributed within the State of California unless (1) such statement of value is based upon the fair market value of such goods or services established by a substantial number of retail sales within California within the 90 days immediately preceding such representation and (2) defendants submit evidence in support of such valuation to the office of the California Attorney General within ten days of any such representation."

The above provision could easily preclude Columbia from making a truthful representation because it could not comply with the terms of the injunction. First, the item being offered may not even be sold in California prior to Colombia's offering it for sale. Second, the term substantial is not even defined. Third, the requirement of submitting information to representatives of the State which may not exist or which may be difficult or impossible to obtain is a classic form of prior restraint which has long been held unconstitutional. *See Freedman* v. *Maryland, supra.* It is important to note that neither the Appellate Court, or the order of injunction give Columbia any indication as to the value which Columbia may represent as being attributable to its vacation certificate. The above are merely two examples of how the terms of the injuncton exceed constitutional limitations.

The overbreadth of the injunction and its vagueness directly inhibit Columbia's ability to disseminate its advertisements within the State of California. In attempting to exercise its First Amendment rights it is faced with the specter of criminal contempt for failure to

disclose a charge or restriction which it may not consider material, or to state the value of an item which cannot be readily ascertained. An innocent and truthful statement may subject an officer of the company to sacrifice his liberty.

As Chief Justice Burger pointed out in his dissenting opinion in *Pittsburgh Press Company* v. *The Pittsburgh Commission on Human Relations,* 413 U.S. 376, 396 (1973), a person who is seeking to exercise his protected First Amendment rights should not be required to run the risk of contempt, or he will be unreasonably restrained. A prior restraint having an inhibiting effect on protected First Amendment freedoms similar to the one presented here cannot be sustained. *See Near* v. *Minnesota,* 283 U.S. 697 (1931); and *Organization* for a *Better Austin* v. *Keefe,* 402 U.S. 415 (1971).

Under the guise of regulating allegedly deceptive advertising, the State has sought to bar Columbia from doing business within the State of California because a company with whom Anderson was connected suffered a prior bankruptcy. (C.T. 56) In drafting the injunction the State has not attempted to regulate statements which might mislead its consumers but has sought to "chill" Columbia's exercise of its right to disseminate its advertisement under the First Amendment.

The State has already indicated its willingness to further inhibit Columbia and any other person who finds himself presented with a similar injunction. Notwithstanding the fact that no evidence was introduced establishing that its original sales letter was misleading, Columbia and one of its officers are faced with a criminal complaint for allegedly violating the preliminary injunction, despite

the fact that its sales letter has been substantially modified. (See footnote p. 8) This method of State regulation of any form of commercial speech cannot be sanctioned. The action of the State of Califonia in restricting Columbia's very ability to do business cannot be allowed to stand.

CONCLUSION

For the above and foregoing reasons Petitioners Columbia Research Corporation and Raymond Anderson pray that the Petition for Certiorari be granted.

Respectfully submitted,

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APPENDIX A

PRELIMINARY INJUNCTION ENTERED BY THE TRIAL COURT ON DECEMBER 8, 1975

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
CITY AND COUNTY OF SAN FRANCISCA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. COLUMBIA RESEARCH CORPORATION, an Illinois corporation; et al., Defendants.	No. 694-645 Preliminary Injunction [CCP § 527; Bus. and Prof. Code § 17535; Civ. Code § 3369(5)]

The motion of plaintiff for the preliminary injunction made herewith came on regularly to be heard on November 19, 1975. Deputy Attorney General James B. Cuneo appeared as counsel for plaintiff and Eugene N. Rosenberg, Esq. and Lawrence C. Rubin, Esq. appeared as counsel for defendants Columbia Research Corporation and Raymond Anderson.

Proof having been made to the satisfaction of the Court, and good cause appearing therefore;

It Is Hereby Ordered that during the pendency of this action, defendants, and each of them, and their officers, agents, employees, representatives and all persons acting in concert or participating with them, shall be and they are hereby enjoined and restrained from engaging in, committing or performing, directly or indirectly, or by any means whatsoever, any of the following acts:

(a) representing directly or impliedly that any California resident is to receive any gift, award, or prize, however designated, unless such gift, award or prize is to be provided at no cost or obligation regardless of whether designated a registration, service, packaging, handling or freight charge to the person so contracted;

(b) representing that any person has in any way been "selected" to receive any gift, award, prize or offer unless the criteria for selection are specifically set forth in the notice of selection;

(c) representing that any offer is "limited" unless the limitations, including the number of persons to receive the offer, criteria for selection, duration of the offer, or any other limitation are specifically described to the recipient of the offer;

(d) making any representation concerning the value of any goods or services which are offered to be sold or otherwise distributed within the State of California unless (1) such statement of value is based upon the fair market value of such goods or services established by a substantial number of retail sales within California within the 90 days immediately preceding such representation and (2) defendants submit evidence in support of such valuation to the office of the California Attorney General within ten days of any such representation;

(e) describing any goods or services, whether accommodations, meals, or other goods or services, as "first class" unless such goods or services or equivalent to the highest quality of goods or services offered within the geographic area within which they are to be provided;

(f) designating any goods or services as equivalent in quality to any other goods or services unless such representation is true;

(g) failing to disclose any additional charges, restrictions or limitations upon the use or obtaining of any goods or services which are offered by defendants, such disclosures to be made within any promotional materials in immediate proximity to the description of the benefits to which any such limitations, restrictions or additional charges are applicable;

(h) collecting or accepting any moneys which have been transmitted to defendants by any California resident in reliance upon any representations which are not in conformity with the foregoing requirements;

(i) accepting any moneys in payment for any goods or serviecs which are not to be delivered or provided in full within six weeks of receipt of payment;

(j) failing to offer, and if such offer is accepted, to make, a full refund of all moneys paid for any goods or services which are not provided within six weeks of the receipt of payment.

Dated: Dec. 8, 1975

.....

WILLIAM E. MULLINS
Judge of the Superior Court

APPENDIX B

OPINION OF THE COURT OF APPEALS OF THE STATE OF CALIFORNIA FIRST JUDICIAL DISTRICT

People of the State of California v. Columbia Research Corporation *et al.*

No. 1 Civil 38988

Opinion filed April 7, 1977

The People of the State of California filed a complaint for injunction, civil penalties, restitution and other equitable relief against defendants Columbia Research Corporation, et al. Shortly thereafter, the State filed a motion for preliminary injunction. The superior court granted this motion and the preliminary injunction was issued. The appeal is from the order granting the preliminary injunction.

I

It is well settled that whether a preliminary injunction shall be granted rests largely with the discretion of the trial court. Its decision will not be reversed on appeal unless there is a clear showing of abuse of discretion. (Isthmian S.S. Co. v. Nat. Marine Etc. Assn., 40 Cal.2d 433, 435, overruled on other grounds in Smyrniotis v. Local Joint Executive Bd., 64 Cal.2d 30, 40; Oktanski v. Burn, 138 Cal.App.2d 419, 422; Christopher v. Jones, 231 Cal.App.2d 408, 412.) In deciding the case at hand, this court is necessarily governed by settled rules on appeal. "[T]us, in ascertaining whether the facts warrant an order granting a preliminary injunction, it is incumbent upon this court to view such facts most favorable to the plaintiff (citation); and in considering an order involving the decision of a question of fact, made on

affidavits,[1] all conflicts must be resolved in favor of the prevailing party (ctation), and all reasonable inferences which are to be drawn must be in support of the trial court's order (citation)." (Family Record Plan, Inc. v. Mitchell, 172 Cal.App.2d 235, 239; Metro-Golwyn-Mayer, Inc. v. Lee, 212 Cal.App.2d 23, 27-28; see also Griffith Co. v. San Diego Col. for Women, 45 Cal.2d 501, 508-509.)

Columbia contends on appeal that the trial judge granted the preliminary injunction without foundation in either law or fact. Legally, an injunction can issue to prevent false or misleading advertising and unlawful, unfair or fraudulent business practices authorized by Business and Professions Code section 17535 and Civil Code section 3369. The question remaining is whether there was sufficient evidence to support the trial court's decision to grant the preliminary injunction. Columbia argues that there was insufficient evidence to justify any of the restraints imposed on its activities in the 10 paragraphs of the preliminary injunction. However, a review of the record indicates that the trial court did not abuse its discretion in granting the preliminary injunction.

(First) The introductory language in Columbia's sales letter (e.g., "Congratulations: Are you in for a Big

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[1] Although much of the evidence from both parties was presented in the form of declarations rather than affidavits, the effect is the same under Code of Civil Procedure section 2015.5. As Witkin states:

"C.C.P. 2015.5 provides that whenever, under any law, rule or regulation, an affidavit or other sworn statement is required or permitted to support 'any matter,' such matter 'may with like force, and effect' be supported by an 'unsworn statement, declaration, verfiication, or certificate.' The declaration must give the date and place of execution within this State, and must be subscribed and 'certified or declared' to be true 'under penalty of perjury.'" (2 Witkin, California Procedure (2d ed. 1970) Provisional Remedies, § 5, p. 1469.) The declarations in this case comply with the above requirements.

Jackpot Surprise!!! It is indeed my pleasure to inform you that your name has been selected by our computer and you are to receive the following") could easily imply to a consumer that he is to receive a gift, award or prize. Since the only disclaimer to this implication is in much smaller print on the fourth page of the materials, it is a reasonable inference that many consumers will not see the disclaimer. Business and Professions Code section 17537 specifically proscribes the notification of any person as part of an advertising scheme that he has won a prize and that, as a condition of receiving the prize, he must purchase goods or services.

(Second) Although the promotional letters stress the fact that the person receiving the letter has been specially selected they do not explain the basis for selection. One of the letters states "the computer selected *your name* among others, as the lucky person to receive this invitation — based on your geographic location, interests, etc." This, however, does not overcome the initial impression to the consumer that he falls within a small category of specially selected people. Yet, the evidence indicates that similar offers have been made to hundreds of thousands of people across the country. Therefore, the overall impression is misleading.

(Third) Similarly, the letter is replete with statements that the offer is limited, both in terms of participants and in duration. Once again, without accurate disclosure of the manner in which the offer is limited the overall effect may be misleading. As the State points out in its reply brief: "If it were disclosed that the offer was in fact neither particularly selective nor limited, consumers would be considerably more likely to realize they were being solicited to purchase rather than otherwise obtain the benefits of the program."

(Fourth) In one of its sales letters, Columbia represents that the value of its offer is $450 or more; in the other, it is described as a "more than $500 benefit package." Business and Professions Code section 17501 provides in pertinent part that ". . . the worth or value of any thing advertised is the prevailing market price, . . . at the time of publication of such advertisement in the locality wherein the advertisement is published." An examination of the evidence provided by Columbia as to the value of the components of its offer, shows that the trial judge could reasonably infer that the total value of the offer was misrepresented under section 17501.

(Fifth and Sixth) In the letters, Columbia describes the lodgings to be provided participants as "strictly first class" and "AAA recommended or members of a nationally recognized hotel organization." Although Columbia argues that "first class" means only "good quality" as opposed to "inferior quality," the trial court could reasonably have decided that the term generally means much more to the consuming public. Definitions of the term in dictionaries probably reflect the more common understanding of the term: "the best, finest, or highest class, grade or rank"; ' 'the most expensive and luxurious class of accommodations." Furthermore, a declaration from a representative of AAA submitted by the State demonstrated that none of the hotels or motels participating in the vacation package was AAA approved. There was no evidence before the trial court as to whether the hotels and motels were members of a nationally recognized hotel organization.

(Seventh) The evidence shows several restrictions and limitations upon purchasers of vacation certificates which were not disclosed in the initial sales letters. Several of the declarations which were submitted to the court by the State listed the additional terms and conditions which were not previously mentioned in the original promotional materials.

(Eighth) Since the court determined that Columbia should be restrained from the activities described in the first seven paragraphs of the preliminary injunction (a-g), it properly restrained Columbia from accepting money sent as a result of the aforementioned activities.

(Ninth and Tenth) Business and Professions Code section 17538 requires, in effect, that consumer goods and services ordered and paid for by mail be delivered within six weeks from the date of payment. The alternatives to delivery include sending an explanatory notice of delay, offering equivalent goods or services, or making a full refund within six weeks. Even assuming that Columbia is correct in arguing that the only thing it offers to consumers is the vacation certificate (not the package), the certificate or one of the alternatives listed above must be delivered to purchasers within six weeks under section 17538. Several of the declarations submitted by the State show that the vacation certificates were not received within six weks from date of payment. Yet, none of these purchasers were given refunds or any of the other alternatives provided by section 17538. Columbia presented affidavits to the effect that delays were caused by consumer and Post Office errors. The trial court obviously chose to believe that Columbia was not completely free from fault in late deliveries or refunds. Furthermore, contrary to Columbia's assertions that it is exempt from section 17538 under provisions of section 17538.3, subdivision (c), the vacation certificates do not qualify as "consumer goods or services, such as quarterly magazines, which by their nature are not ready for use or consumption util a future date and for that reason cannot be stocked at the time of order."

II

The preliminary injunction is not so vague or ambiguous that it is void. In its brief to this court, Columbia discussed each paragraph in the injunction with great specificity. In most instances, Columbia displayed familiarity with which parts of its promotional materials and business practices the preliminary injunction was designed to restrain. In view of this familiarity, it is unreasonable for Columbia to now claim that because of vagueness or ambiguity it cannot identify which of its activities are enjoined. Furthermore, the fact that the

terms of the injunction are sometimes broader than is necessary to restrain the precise act engaged in by Columbia does not make in void. For example, in paragraph (e) of the preliminary injunction, Columbia is enjoined from: "describing any goods or services, whether accommodations, meals, or other goods or services, as 'first class' unless such goods or services are equivalent to the highest quality of goods or services offered within the geographic area within which they are to be provided."

Although Columbia actually described only its motel accommodations as being "first class," the broader language is necessary to prevent Columbia from violating the spirit of the injunction while technically complying with narrowly drawn terms. This reasoning applies to each paragraph in the preliminary injunction.

Finally, Columbia cites *Pitchess* v. *Superior Court,* 2 Cal.App.3d 644, in support of its contention that the preliminary injunction is so vague and ambiguous that it is void. In that case, the court determined that a preliminary injunction forbidding petitioners from enforcing any laws with regard to "nude entertainment" was too broad, and that consequently "men of common intelligence must necessarily guess at its meaning and differ as to its application." (*Supra,* at p. 651.) The preliminary injunction in this case does not suffer from such a defect. The language relates to the promotional activities and the busness practices of Columbia, not to a relatively general activity that could occur any time, any place, and under any auspices. Since Columbia need not guess at the meaning and differ as to the application of the present preliminary injunction, the trial court did not exceed its power in granting it.

III

Appellant's final contention is that the injunction constitutes an impermissible restriction upon their right of free speech under the First Amendment of the United States Constitution. In so arguing, Columbia relies on

the United States Supreme Court decision of *Bigelow* v. *Virginia,* 421 U.S. 809. In *Bigelow,* the Supreme Court stated that "the existence of 'commercial activity,' in itself, is no justification for narrowing the protection of expression secured by the First Amendment." (*Supra,* at p. 818.)

The Supreme Court in *Va. St. Bd. of Pharm.* v. *Va. Cit. Cons. Council,* 96 S.Ct. 1817, dealt more explicitly with the type of problem found in the present case. In that case, consumers brought suit against the Virginia State Board of Pharmacy challenging the validity of a Virginia statute declaring it unprofessional conduct for a licensed pharamcist to advertise the prices of prescription drugs. The court held, inter alia, that the statutory ban on advertising prescription drug prices violated the First and Fourteenth Amendments. After reaching this specific decision, the court stated that "[s]ome forms of commercial speech regulation are surely permissible" and went on to give examples of state regulations *not* foreclosed by the case. (*Supra,* at p. 1830.) Among the examples given by the court, was the situation involving false or misleading advertising.

In light of the foregoing Supreme Court decision and its discussion of state regulation of commercial advertising, the preliminary injunction in the present case is a reasonable regulation and therefore does not violate Columbia's First Amendment rights.

The order granting the preliminary injunction is affirmed.

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Caldecott, P. J.

We concur:

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Rattigan, J.

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Christian, J.

APPENDIX C

SALES LETTER OF COLUMBIA RESEARCH CORPORATION

COLUMBIA RESEARCH CORP.
3762 W. Devon Avenue
Chicago, Illinois 60659

Congratulations:

Are you in for a pleasant surprise!

It is indeed my pleasure to inform you that your name has been selected by the computer of our consumer research company and you are to receive the following:

A luxurious vacation for two in the casino capital of the world, Las Vegas, Nevada, where adult fun awaits you 24 hours a day. As you know, Vegas is not only the casino capital, it's also the entertainment capital of the world.

> You are going to get well over $500 in benefits for your *Las Vegas Vacation For Two — including* lodging, food and beverage allowance, roll after roll of cash nickels, a bundle of bucks good for casino play, free slot machine play, and if you should decide to fly to Las Vegas you will be greeted at the airport and be *presented with the keys to a new 1975* air conditioned, fully automatic Chevrolet. It will be yours in Las Vegas for a full 24 hour day.

You ask — how is it possible?

I will try and make the answer as simple as I can in the short space available. You know about all the money spent on advertising, sales promotion, publicity, TV game shows, etc. in this country. A fortune! Well, Las Vegas

is one of the biggest and best promoters around. Most important, they want to keep the motels packed with fun-loving people, the wheels turning, the word-of-mouth publicity spreading.

It's the smartest advertising in the world.

That's why they have authorized me to offer a limited number of Vacations for Two. And, like I said before, the computer selected *your name* among others, as the lucky person to receive this invitation based on your geographic location, interests, etc.

BECAUSE YOU HAVE BEEN SELECTED .....

Now you can avoid the cost of high-priced holiday vacation this year — and still have the time of your life! If you've never been to Las Vegas, you have got a spectacular treat in store for yourself. Arising from the desert is a city of incredible lights and light-hearted fun. *A city of glitter and glamour, action and anticipation, luck and luxury.* People from all walks of life stream to this mecca of pleasure — many coming thousands of miles. Maybe you are one who has already experienced this ultimate of carefree cities. If so, I suspect you don't need much urging to return — *especially when you will be arriving in town with the more than $500 benefit Package Paid-in-full*!

The city itself is situated in an ideal setting.

If you love the great outdoors, you and the family can relax around the beautiful desert-landscaped pool adjoining your motel room. Soak up the sunshine, breathe the clean fresh desert air.

Use your motel as a base for exploring. You may want to visit Hoover Dam, one of the seven wonders of the world. See and enjoy scenic Lake Mead, or visit Death Valley and Mt. Charleston. In this area alone, it is possible to water ski on beautiful Lake Mead and don snow skis on nearby 12,000 foot Mt. Charleston, all in the same day. Yes, all this outdoor fun awaits you and your family just over the horizon from glittering Las Vegas.

Here's more good news to make sure there's no reason for you to miss out . . . .

> You have a full year to take advantage of your Vacation For Two from the time you indicate your interest by returning the enclose document (we do ask that you return it promptly).

That's right . . . you can leave almost immediately as soon as the paperwork is processed — or schedule the Holiday whatever month in the future suits you best. Southern Nevada is known for its perfect climate — clear and dry — the year around.

Of course, you're anxious to know what is included in your fabulous Las Vegas Vacation For Two. . . .

Your motel accommodations are included and they are going to be strictly First Class with air-conditioned rooms and private bath, right on the strip, just a short distance to all the fun and excitement Las Vegas has to offer. You get three sun-filled days and two fun-filled nights of lodging paid-for-in-full. Of course, you can extend your stay if you like, in which case you don't pay the posted room rate (about $30 to $38 a night) but get a substantial discount. Children are welcome.

Your meals and drinks are included in the $71.28 Food and Beverage Allowance coupons you get to spend on your holiday. You can wine and dine handsomely on this generous amount. Choose from delicious menus, exotic drinks — whatever suits your fancy. When two people dine you pay only for the highest-price meal ordered, the second meal is free.

You get another $36 bonus in the form of Cash Nickels to spend anyway you wish. Naturally, the casino wouldn't object if you were to use them to play your favorite game but you don't have to if you don't want to.

While you are under no obligation to try your luck at any of the casinos unless you choose to, here is what you get from them if you decide to play . . . you just

might parley your "stake" into big winnings. Regardless, it is more fun included in your package of benefits.

Your Las Vegas Vacation For Two gives you $60 in Lucky Bucks (Match Play) Money. That's free money from the casino you match with your own to double the amount of your winnings (it can also tide you over until you start on a winning streak).

Try your hand at the many games Las Vegas has to offer .... 21 .... Big 6 .... Roulette .... Poker .... Baccarat .... and many more. Spin the wheel of fortune, call a full house, score a perfect nine in Baccarat — the game sometime called "Blackjack in Evening Clothes" that's gaining so much popularity lately.

All the above benefits would make any trip to Las Vegas a terrific deal but that's not all you get — not by a long shot. In addition, *you get a whopping $360 in free slot machine play* — I repeat, $360! Try your luck — again and again — score big! You get all this from one big-name casino .... there's no need to go from one place to another to "cash in" on these benefits.

Whether your preference is simple and fun, the great outdoors, dining out, show time, or the thrill and excitement of testing your luck at the gaming tables — it all awaits you at fabulous Las Vegas.

You must provide your own transporatation so you can travel however you like, schedule your trip whenever you like (subject to our confirming the dates for your motel stay).

> You don't have to make your reservations now. You do this after receiving the material we send you, and, whenever during the coming year, you are ready to plan your departure date.

Here is all you have to do to get your over $500 in Las Vegas benefits. . . .

Simply endorse the back of the enclosed registered document and mail it back to me in the postage-paid reply

envelope with your *check or money order for $15* (that's less than half of what you get back in Cash Nickels alone). This entitles you to all benefits and covers the cost of computer selection and registration of your name, printing this invitation and other material you receive, processing your motel reservations, and other services.

Because your good will is very important to us, we make you this *guarantee.* If for any reason, upon completion of your Holiday For Two, you are not delighted or did not receive all your benefits, your $15 will be promptly refunded upon request.

We ask you to act promptly and acknowledge this notification *within 10 days* to assure your eligibility for all your benefits. Whenever during the coming year you decide to take your Vacation Holiday For Two, I promise you a delightful, fun-filled time in fabulous Las Vegas you will long remember. Again, congratulations on the good news this letter brings and I hope the rest of your day continues to be lucky for you.

Cordially yours,

/s/ David Moore
David Moore
Consumer Research Director

P.S. I'll include a special bonus if you'll give me your OK within 10 days (see enclosed sheet). This bonus alone *can save you hundreds of dollars* regardless of where you travel or vacation during the coming year.

Resorts accept major credit cards such as Bank-Americard, Master Charge, American Express, Diners Club, etc.

Transportation not included.

Primary holders of this vacation package must be at least 21 years of age, married and accompanied by spouse. Or, two unmarried persons of the same sex approximately the same age in the same room. One certificate per family. This offer open to residents of United States, except employees of COLUMBIA Research and their families.

This is an incentive program offer. It is not a contest or prize notification. Void where prohibited by law. If you should decide to fly to Las Vegas you will be greeted at the airport and be presented with the keys to a new 1975 air conditioned, fully automatic Chevrolet. It will be yours in Las Vegas for a full 24 hour day. Mileage is extra and no minimum mileage required. Arrangements can be made to keep the car for your entire stay. Invitation subject to minor change without notice but never less than stated value.

Now you can invite others to join you or give a gift of a Las Vegas Vacation For Two to someone very special. You may order an additional vacation benefit package by filling out the information at right and mailing this form to us. Only one vacation benefit package per year per family can be obtained. Vacations can be planned together or separately. You must include your own name, address and *registered number* as it appears on the original mailing document.

ATTN: DAVID MOORE

This is an extra order for a friend of ours. Will you please send an extra Las Vegas Super Jackpot Holiday Vacation to the name and address listed below. (Do not send this portion if you are ordering for yourself, you must use the Green Computer Form that accompanied this letter. Only use this form when ordering for someone other than the name that appears on the Green Order Form.)

Enclosed you will find a personal check or money order for $15.00 payable to Columbia Research. I understand that the money back guarantee applies to this order as outlined in your letter.

NAME _____

ADDRESS _____

CITY _____ STATE _____ ZIP _____

100% Money Back Guarantee